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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 136

GETTIG EQUIPMENT CORP. and
GINDY MANUFACTURING CORP.,

Appellants,

vs.

BOARD OF ZONING APPEALS,
CITY OF CLEVELAND,
NATHAN H. SINGER, COMMISSIONER,

Appellees.

APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF IN OPPOSITION TO MOTION OF APPELLEES TO DISMISS OR AFFIRM.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

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COMMENTS IN REGARD TO SUPPLEMENTAL STATEMENT OF FACTS.

At page 2, Appellees state that the hearings before the Board of Zoning Appeals extended over four months. This is true. This also accentuates the void in Appellees case wherein during this entire four-month period they did not provide one expert to state that the proposed use of Appellants was contrary to the health, safety, welfare and morals of the community, or was more obnoxious or harmful.

At page 20 of their jurisdictional statement Appellants challenged the Appellees "to cite to this Court any place

in the record where there is any substantial, probative evidence to indicate that the proposed substituted use is either more obnoxious or more harmful than the prior use, or that the proposed use is contrary to the health, safety, and morals and general welfare of the residents of the City of Cleveland." Nowhere in their motion to dismiss or affirm or the statement of fact or argument do Appellees cite such evidence to the court. At page 3 of their Brief they say that there is testimony that the proposed use is more "harmful" but nowhere do they state where in the record this testimony appears.

At page 2 Appellees, referring to Appellants, state "their application for a permit requested permission for 'retail and wholesale sales, service, leasing and fabricating of all kinds of vehicles' in particular their operation consisted of assembling, repairing, storage and the sale of large 20 to 40 foot trailers as used in tractor trailer rigs." It should be noted that the Board of Zoning Appeals gave permission to Appellants to use a portion of the premises for the "*repairing*" of such trailers. It would seem to this writer that this would be the most obnoxious of the uses requested, and that the other uses requested are less obnoxious and merely ancillary to the repairing and sales (which was *not* granted) of such vehicles.

At page 3 the Appellees admit that the Cleveland Transit System had "established a nonconforming use." They go on to state that the nonconforming use was discontinued on June 15, 1963.

In the record at 5/31-21 & 24 August A. Maran acting chief counsel for the Transit Board stated "my findings are that the use of the property continued up until the date that the Transit Board authorized it for sale." This date was September 1965, a month or two before Appellants purchased the subject premises.

In a letter dated April 14, 1966 from Robert F. Mooney, chief legal counsel of the Cleveland Transit System, to the Secretary of the Board of Zoning Appeals in regard to the subject property, Mr. Mooney stated "this is to inform you that our Woodhill Station property was sold in October of 1965. It had been used for storage facilities and to short-turn our equipment *since* June, 1963 * * *" (Emphasis supplied).

Howard Cumler, Superintendent of Transportation of C.T.S., testified *at the request of the Zoning Board.* He stated that the property was used as a short-turn terminal (5/31-6) and storage of rolling stock (5/31-8) and that the northerly two-thirds of the property was used for storage of vehicles (5/31-18).

Vice-Chairman Kreinberg (of the Board of Zoning Appeals) found from the testimony of Cumler that "up to the time of the sale, approximately 40 buses were using the area for a loop purpose" (5/31-12).

Mr. Cumler further stated at 5/31-13 & 19 that up to the date of sale the subject premises was used for outside storage of buses.

All of the foregoing is simply to show that there was no abandonment of nonconforming uses which were more obnoxious and/or harmful than the use proposed by Appellants.

At page 3 Appellees state that Mr. Gettig knew of the existing zoning, but they omit the fact that he also knew what its current use was.

They go on further to indicate that Gettig knew that C.T.S. had discontinued the using the property two years prior to his purchase (4/18-24, 25). This is not true. The Chairman began to press Gettig as to the discontinuance of a use, but he did not say specifically which use was discontinued and then finally at page 25 Mr. Gettig states

"they told me it was approximately two years prior to the time of the advertising," but this does not define which particular use they are talking about and further on page 25 Mr. Gettig says "I do not recall any specific time in our discussion except that at the time of our discussion I knew they were no longer using it for their service area. They had moved out of the property." It would seem to this writer that the important factor is not whether Gettig knew or thought he knew that it was approximately two years prior thereto or some other time or had made a mistake, but the true facts as elicited from the witnesses supplied by the Cleveland Transit System at the request of the Board of Zoning Appeals should control.

At the bottom of page 3 Appellees correct Appellants insofar as the zoning across the street from the subject premises. It is true, Appellants were in error. The zoning for the first approximately 100 feet west of Appellants' property is semi-industry and west thereafter it is general industry, and the property descends into what is known as the industrial valley of Cleveland where there are steel mills and other types of heavy industry.

ARGUMENT.

By and large Appellants do not take issue with the cases cited by Appellees. They simply do not apply to the issues raised in the Appeal.

We take issue with the statement in the last line of page 4 where Appellees state "since this ordinance is clearly not arbitrary, a court will not substitute its judgment for that of a municipal legislative body * * *." We do not say that the ordinance is arbitrary, we say that the *application* of this particular ordinance to this particular parcel of real estate is arbitrary, unreasonable and confiscatory.

We take issue with the italicized statement of page 5 "after acquiring this property he was in no way deprived of any rights extended to each and every other property owner." Nonconforming rights adhere to the land, not the owner. If the City of Cleveland itself and its Cleveland Transit Board had nonconforming rights to use the subject property for storage of vehicles and a short-turn terminal and the record discloses that our proposed use was not contrary to the health, safety, morals or general welfare of the residents of the City of Cleveland and was no more harmful or obnoxious, then the Board of Appeals abused its discretion in not granting a variance, the same variance they had granted the previous owner. Hence, the present owner has been deprived of property rights extended to the prior owner.

Appellants respectfully request permission to adopt, by reference, their jurisdictional statement as if fully rewritten herein, and make it a part of this Answer Brief.

Appellants urgently request the Court to overrule Appellees' Motion and to permit this cause to be heard upon the merits.

Respectfully submitted,

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Attorney for Appellants.